JUN 27 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 182

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
Petitioner

v.

JOSEPH W. BUCHANAN, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LOUIS M. DENIT,
THOMAS S. JACKSON,
RICHARD A. BISHOP,
Attorneys for Petitioner.

BRANDENBURG & BRANDENBURG,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Massachusetts Protective Association, a corporation, by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on March 24, 1955.

OPINIONS BELOW

The trial court filed a written opinion (R. 27-30), as did the Municipal Court of Appeals for the District of Columbia. (R. 46). The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been officially reported, but is set forth in the appendix filed herewith. (App. 2a-7a)

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered March 10, 1955. A petition, seasonably filed, for rehearing in banc, was denied on March 24, 1955.

The statutory provision believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended, 28 U. S. C. 1254 (1), 1952 ed.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

On June 16, 1953, respondent filed a civil action in the Municipal Court for the District of Columbia to recover full indemnities for total disability resulting from disease which began before and continued after he reached age sixty. Petitioner defended on policy provisions which expressly reduced indemnities 50% after the insured reached that age. Since it had paid on this basis, it denied further liability. The trial court found in favor of the petitioner, and entered judgment accordingly. (App. 11a-15a). Respondent appealed to the Municipal Court of Appeals for the District of Columbia, which affirmed the trial court by a unanimous opinion. (App. 8a-10a). On application of respondent the United States Court of Appeals for the District of Columbia Circuit allowed an appeal.

The case was duly heard, and on March 10, 1955, the Court reversed by a two to one decision, the dissenting judge holding that there should be an affirmance in accordance with the opinion of the Municipal Court of Appeals.

In view of the widespread effect of the decision by only a division of the Court (three judges) a petition for rehearing in banc was filed within the time allowed. This petition was denied on March 24, 1955, without any assignment as to the reasons for denial. (App. 1a). The judgment of reversal is sought to be reviewed by this petition for writ of certiorari.

ADMITTED FACTS

On March 4, 1924, the petitioner issued two policies of accident and health insurance to respondent, one known as the "Perfection" Policy (R. 38), and the other known as the "Daily Benefit" policy. (R. 39). The two policies were almost identical, differing only as to the extent of coverage and rate of indemnity.

The Perfection policy provides indemnity for loss of life, limb, sight and time by accidental means, or of time by disease, the principal sum for accidental death and for losses enumerated in Clause E, being $5,000.00. For total disability resulting from accident or disease, Clause A provides for a weekly indemnity of $50.00 *"as hereinafter limited"*. Clause I provides as follows:

> "The weekly indemnity provided for in this policy for disability caused by accidental injury shall be paid so long as the insured lives and suffers continuous total disability from the date of the accident, otherwise weekly indemnities for disabilities caused by accident or disease shall not collectively cover periods exceeding sixty (60) weeks.

> Thereafter the insured may at his option continue the policy for its death and dismemberment benefits at one-third the then premium, or cancel the same and receive from the Association the premium paid for any unexpired period hereunder * * *."

Clause N provides:

> "The term of this policy commences upon the date hereof and until the insured's seventieth birthday. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent."

The Daily Benefit policy provides indemnity for loss of time by accident or disease. Clause A provides that for total disability, the indemnity is $7.00 per day, *"as hereinafter limited"*. Clause E provides:

> "The indemnities provided by this policy, collectively, shall not cover periods of disability exceeding 365 days in the aggregate * * *."

Clause I provides:

> "The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday unless the policy previously expires under provision E above. After the insured passes his sixtieth birthday, all indemnities payable under this policy will automatically be reduced Fifty Per Cent."

There was attached to each policy what is designated "Continuous Disability Rider.". The rider in the Perfection policy provides, in part, as follows:

> "If total disability resulting from disease and arising thereunder prior to the insured's sixtieth birthday continues beyond the sixty weeks de-

scribed in Clause I of the attached policy, the weekly indemnity provided by said policy shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled * * *."

The rider attached to the Daily Benefit policy reads, in part, as follows:

> "If total disability arising thereunder prior to the insured's sixtieth birthday continues beyond the 365 days described in Clause E of the attached policy, the weekly indemnity provided by said policy shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled by accident, or similarly disabled and necessarily confined within the house by disease, in either case under the regular care of a licensed physician. * * *."

Respondent was 32 years old when these policies were issued. If he had become totally disabled by disease after the effective date of the Perfection Policy, the rider permitted him to use up the aggregate of sixty weeks at the full rate of $50.00 until his sixtieth birthday. If he lived thereafter, the benefits would continue under Clause "N" at the half rate following his sixtieth birthday, but as long as he was continuously totally disabled, regardless of how long he lived.

Under the Daily Benefit Policy, he was entitled to $7.00 per day pursuant to Clause "A", for 365 days in the aggregate as limited by Clause "E", for period commencing with the date of the policy and running until his 70th birthday, unless prior thereto the policy expired under Clause "E" as provided in Clause "I". The latter clause also provided that after he passed his sixtieth birthday all indemnities would be reduced 50%.

The rider eliminated the restriction of 365 days which would otherwise obtain, and provided that if total disability arose prior to his sixtieth birthday the weekly indemnity should continue as long as he thereafter lived and was continuously totally disabled.

These policies have been in force for 30 years. Respondent has made thirty-three (33) claims for indemnity, and on account thereof he was paid $4,987.72. For his present disability, which was not disputed, he was paid full indemnity until November 21, 1952, at which time he reached age sixty. Thereafter petitioner reduced the payments fifty percent in accordance with the express language of the policies. Thereupon, respondent claimed that this interpretation was erroneous, and that indemnities should only be reduced if the disability commenced after he reached age sixty. The petitioner took the position that the policies meant exactly what they state, that is, indemnities will be reduced fifty percent after age sixty, nothing more, nothing less. Five judges agreed, i.e., the trial judge, all three judges of the Municipal Court of Appeals, and one judge of the United States Court of Appeals for the District of Columbia Circuit.

REASON FOR GRANTING THE WRIT

I. The decision below fails to give proper effect to applicable decisions of this Court, to applicable decisions in other circuits, and to prior decisions of the District of Columbia Circuit. It is in conflict therewith on a fundamental principle of law which is of general importance, namely, that insurance contracts, like other contracts, should be construed according to the sense and meaning of the terms used by the parties. Ambiguities are not to be sought or reached for. Words

used are to be construed in the ordinary and popular sense.

II. The decision below disregards the plain and unambiguous terms of the policies and creates a new contract for the parties in violation of Section 10, of Article 1, of the Constitution of the United States.

III. The decision below extends liability of the insurer far beyond the limits fixed by its contracts, imposes a financial burden for which no compensation is received, and, in the last analysis, adversely affects the best interests of the public.

POINT I

The United States Court of Appeals for the District of Columbia Circuit Has Not Given Effect to Applicable Decisions of This Court, and is in Conflict Therewith and With Decisions of Other Circuits and Its Own Prior Decisions

In reversing both lower courts, the United States Court of Appeals departed from a universal rule of construction which always has been recognized as sound by this Court, and others, both Federal and local, throughout the country.

The trial court and the Municipal Court of Appeals agreed that the language of these policies is clear and unambiguous. In reversing, the United States Court of Appeals concluded that Clause "N" in the Perfection Policy is applicable only to disabilities *commencing* after age 60. This, in effect, constituted a rewriting of the policy, although there is no evidence that it failed to state accurately and completely the intention of the parties at the time it was issued. The holding conflicts with the following decisions of this Court:

Aetna Insurance Co. v. *Boon,* 95 U. S. 117, 24 L. ed. 395.

Imperial Fire Ins. Co. v. *County of Coos,* 151 U. S. 452, 38 L. ed. 231.
Liverpool, etc. Ins. Co. v. *Kearney,* 180 U. S. 132, 45 L. ed. 460.
Bergholm v. *Peoria S. Ins. Co.,* 284 U. S. 489, 76 L. ed. 460.

In *Imperial Fire Ins. Co.* v. *Coos,* supra, this Court said:

> "It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of this policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. *The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.*"

In *Thompson* v. *Phenix Ins. Co. of Brooklyn,* 136 U. S. 287 [34:408], this Court indicated that when an insurance contract is ambiguous, or requires interpretation, or is fairly susceptible to two different constructions so that reasonably intelligent men on reading the contract could honestly differ as to its meaning, that construction will be adopted which is most favorable to the insured.

> "But the rule is equally well settled that the contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense."

This rule of construction has been universally accepted. We invite the court's attention to decisions in

other circuits which illustrate its application, and demonstrate the error of the decision sought to be reviewed.

Neel v. *Mutual Life Ins. Co. of N. Y.*, 131 F. 2d 159 (N. Y.).
Harbor Towing Co. v. *Atlantic Mutual Ins. Co.*, 189 F. 2d 409 (Md.).
Globe Indemnity Co. v. *Liberty Mut. Ins. Co.*, 138 F. 2d. 180 (Pa.).

The Court below failed to follow the rule laid down, as recently as 1952, in *Union Tr. Co.* v. *Continental Cas. Co.*, 90 U. S. App. D. C. 216, 194 F. 2d 901. Its prior decision is not referred to in the majority opinion, and apparently was not intended to be repealed. We submit, however, that the ruling in the case at bar is contrary to and inconsistent with the case cited.

POINT II

The United States Court of Appeals Has in Effect Made a New Contract for the Parties in Violation of Section 10, Article 1, of the Constitution

The Court of Appeals has disregarded the plain and unambiguous terms of a valid contract, and this action has resulted in the making of an entirely new and different contract which is a violation of Section 10, of Article 1, of the Constitution of the United States.

It is an accepted fact that insurance contracts are effected with a quasi public interest, and because of that, the industry has long been subject to governmental supervision. The ordinary insurance contract must meet the requirements of state statutes, and since the terms of the insurance contracts are so regulated, so must the decisions of courts fit into an accepted pattern. The insurance underwriter is dependent upon a stable

and well defined orbit in which he can operate. Otherwise, the entire industry is without a guide in a field of tremendous risks.

The rules for construing ordinary contracts have long been held applicable to insurance contracts, provided the terms are free of ambiguity. The court below has disregarded this well settled rule of construction. Instead, it has rewritten the contracts, making them conform to its thinking, without a shred of evidence that its interpretation conforms to the actual or presumed intention of the parties, to the damage of the petitioner. This constitutes an impairment of the contract obligation and violates Section 10, of Article 1 of the Federal Constitution.

This court has held that a valid contract may be impaired by wrongful construction. *J. W. Perry Co.* v. *Norfolk,* 220 U. S. 472, 55 L. ed. 548. Where a contract is valid at the time it is made, under state law as then expounded, its validity or obligation cannot be impaired by subsequent judicial decision giving a different exposition of the law. *McLure* v. *Melton,* 133 U. S. 380, 33 L. ed. 660. In a later decision this Court laid down the rule that when there is a diversity of state decisions the first in time may constitute the obligation of contracts and the measure of rights under it. *Muhlker* v. *New York, etc. R. Co.,* 197 U. S. 570, 49 L. ed. 872.

POINT III

Decision Below Adversely Affects Public Interest

It is palpably clear that the decision below extends liability of the insurer far beyond the limits fixed by its contracts. Therefore, it imposes a financial burden for which no compensation is received. In the last analysis this adversely affects the best interests of the

public. This Court will take judicial notice of the vast number of contracts by which individuals seek protection against disability resulting from accident or disease. Rates have been established so that the insurer is provided the means with which to meet its obligations. Without adequate premiums this could never be assured. The ratio between premiums and losses must be estimated in advance. If the estimate is required to run the hazard of judicial decisions which disregard the contract provisions, no insurer is safe. If, as in this case, the company is required to pay full indemnity when it contracted to pay only one-half, the relation between premium and obligation to indemnify is distorted. In the place of an orderly program, within which the company can safely operate, there is substituted confusion and chaos. The company's ability to pay is seriously undermined. The public could and undoubtedly would be adversely affected. This is an element which the Court of Appeals apparently ignored or failed to evaluate.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 12,086, *Joseph W. Buchanan, Appellant* v. *The Massachusetts Protective Association, a body corporate, Appellee,* and that the judgment therein of said United States Court of Appeals for the District of Columbia Circuit be reversed by this Honorable Court, and that your petitioner may have such

other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

THE MASSACHUSETTS PROTECTIVE ASSOCIATION,

By: LOUIS M. DENIT,
THOMAS S. JACKSON,
RICHARD A. BISHOP,
Counsel for Petitioner.

BRANDENBURG & BRANDENBURG,
Of Counsel.

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were this 22nd day of June, 1955, mailed, postage prepaid, to Jo V. Morgan, Jr., Esq., Attorney for Respondent, 815 15th St., N. W., Washington, D. C.

LOUIS M. DENIT.

Filed Mar. 24, 1955

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

January Term, 1955

No. 12,086

JOSEPH W. BUCHANAN, APPELLANT,

v.

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
a body corporate, APPELLEE.

Before: Edgerton, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, in Chambers.

Order

Upon consideration of appellee's petition for a rehearing in banc in the above entitled case, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

PER CURIAM.

Dated: March 24, 1955

Chief Judge Stephens did not participate in the foregoing order.

Circuit Judge Bastian would grant the petition for rehearing in banc.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,086

JOSEPH W. BUCHANAN, APPELLANT

v.

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
a body corporate, APPELLEE

Appeal from the Municipal Court of Appeals
for the District of Columbia

Decided March 3, 1955

Mr. Jo V. Morgan, Jr., with whom *Mr. Duane G. Derrick* was on the brief, for appellant.

Mr. Louis M. Denit, with whom *Messrs. Thomas S. Jackson* and *Richard A. Bishop* were on the brief, for appellee.

Before BAZELON and WASHINGTON, Circuit Judges, and WALTER M. BASTIAN, District Judge, sitting by designation.

BAZELON, *Circuit Judge:* Appellant, the insured under two health and accident policies issued by the appellee, brought suit on the policies in the Municipal Court for the District of Columbia. That suit resulted in a judgment for appellee, which was affirmed by the Municipal Court of Appeals for the District of Columbia,[1] and subsequently we allowed this appeal.

About three months before his sixtieth birthday, appellant became totally disabled by disease and the appellee

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[1] Buchanan v. Massachusetts Protective Ass'n, 102 A. 2d 757 (1954).

duly made payments to him under the policies. But when appellant reached his sixtieth birthday, appellee reduced the payments by fifty per cent. The question is whether such reduction is authorized under the policies. Since the pertinent provisions of the two policies are substantially identical (the chief difference being that one is set up on a weekly basis and the other on a daily basis), it will be sufficient if we confine our discussion to the policy designated as "The Perfection Policy."

The claim is founded upon Clauses "A" and "C" of the policy. Clause "A" provides:

> "*Total Disability from Accident or Disease.* If such injuries or disease result in continuous total disability requiring the regular and personal attendance of a licensed physician, the Association will pay during the continuance of such disability Fifty Dollars per week, as hereinafter limited."

Clause C provides for certain additional payments if the insured is hospitalized or under the care of a registered nurse. The appellee does not question that the disability here comes within the coverage of these clauses of the policy, but it asserts that Clause "N" of the policy effects a fifty per cent reduction in the benefit payments due under Clauses "A" and "C" from the date of the insured's sixtieth birthday. Clause "N" reads:

> "The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent."

But the appellant replies that the reduction is intended to apply only to disabilities arising after age sixty and has no effect upon those arising earlier and continuing thereafter.

The appellee argues, and the court below held, that the language of Clause "N" is unambiguous and leaves no room for construction. To us, however, a provision reducing "all indemnities payable" after age sixty does not—when read in the context here presented—clearly and unambiguously convey that disability benefits already in course of payment are to be affected. The motive for purchasing health and accident insurance is to provide a modest but steady income during periods of disability. It is seriously to be doubted that such insurance could as successfully be sold if the insurance company were to announce to its prospects that at the age of sixty their sustenance was to be cut in half and, we observe, no such suggestion appears in the application form which is part of the policy under Clause "O". The form flatly speaks of a weekly indemnity of $50. To accomplish the fifty per cent vitiation of the contract of insurance which the company seeks, we would insist upon language which unambiguously conveys such an intent to the mind of an ordinary layman. Failing such unambiguous language, doubt should be resolved in favor of the insured.[2]

To be sure, the bare language of Clause "N" can be read as reducing payments on pre-age sixty disabilities. But that clause should not, of course, be "considered alone", as was done by the court below.[3] Clause "A" of

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[2] Stroehman v. Mutual Life Co., 300 U.S. 435 (1937); Phoenix Mutual Life Ins. Co. v. Flynn, 83 U.S. App. D.C. 381, 171 F. 2d 982 (1948). As we said in Hayes v. Home Life Ins. Co., 83 U.S. App. D.C. 110, 112, 168 F. 2d 152, 154 (1948), the customers of insurance companies

> "* * * are, in vast majority, not informed in the obscurities of insurance expertise and not equipped to understand other than plain language. If the companies were permitted to write clear clauses of liability at one point and obscure negations of liability at another, and to maintain successfully the prevalence of the latter over the former, the temptation to sell on one clause and defend on the other would be dangerous."

[3] 102 A. 2d at 758.

the policy undertakes to pay the insured $50 per week during the continuance of certain total disabilities. A rider to the policy, amending Clause "I", undertakes to continue the payments for the life of the insured if the disability occurred before age sixty. Clause "O" provides for an increase in the annual premium from $175 to $205 upon the insured reaching age fifty. Reading Clause "A", the rider, and Clause "O" together, the purport of the policy is that the insured is to be protected for life in case of continuing total disability arising before age sixty and the Company is to be safeguarded against the undeniably greater incidence of disability at advanced ages by the increase in premium rates. A layman, reading Clause "N" against that background, can fairly and reasonably understand it as another provision to safeguard the Company against the increasing incidence of disability. Thus, for the decade between ages fifty and sixty, the Company protects itself by a seventeen per cent increase in premium rate and, for the remainder of the term of the policy between ages sixty and seventy, instead of another increase in premium rate, there is a fifty per cent decrease in coverage, which in effect is a one hundred per cent increase in premium cost. The layman, reading the entire policy, could fairly and reasonably conclude that Clause "N" applies the reduction in coverage only to those disabilities arising after age sixty and that total disability occurring before age sixty enjoys full coverage even though it continues beyond that age.

This construction was placed upon similar provisions involved in the only two decisional authorities referred to by either of the parties. In *Hobson* v. *Mutual Benefit Health & Accident Ass'n*,[4] the insurance clause provided for a monthly indemnity of $100, and the subsequent reduction clause called for progressive reduction of benefits at the rate of ten per cent per year beginning at age fifty-six so that by age sixty monthly benefits would be fifty

[4] 99 Cal. App. 2d 330, 221 P. 2d 761 (1950).

dollars. In *Boillot* v. *Income Guaranty Co.*,[5] the insurance clause called for monthly payments of $100 and the reduction clause provided for a one-third reduction of indemnities accruing after age fifty-five. In both cases, the reduction clause was held to affect only disabilities arising after the specified age, leaving unaffected payments due on account of disabilities commencing earlier. The court below concluded that Clause "N" refers not to *disabilities* occurring after age sixty, but to *payments* then occurring. The word used in Clause "N" is "indemnities". The same word was used in the reduction clause in the *Boillot* case[6] and in the *Hobson* case the word was "benefits".[7] Yet both cases held the provisions to refer only to after-arising disabilities and not to payments for pre-existing disabilities.

We think both the *Hobson* and *Boillot* cases are correct. The court below distinguished them from the instant case because

> "'* * * in those cases the policies contained unequivocal agreements to pay fixed monthly sums and it was held that subsequent clauses, limiting or reducing liability, must fail for repugnancy.'"[8]

In our view this distinction is without substance, since the agreement to pay in the instant case is not less "unequivocal" than the agreements in the cases cited. The court below found the phrase "as hereinafter limited" in the insurance clause (Clause "A") and the phrase "provided by said policy" in the rider prevented the policy in the present case from being an "unequivocal agreement" to pay fixed sums and thus avoided any conflict between those clauses and Clause "N". We note, however, that

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[5] 231 Mo. App. 531, 102 S.W. 2d 132 (1937).

[6] 102 S.W. 2d 132, 143.

[7] 221 P. 2d 761, 763.

[8] 102 A. 2d 757, 758.

the insurance clause in the *Hobson* case included the phrase "subject, however, to all the provisions and limitations hereinafter contained" and the insurance company argued that the phrase should serve to "tie in" the reduction clause with the insurance clause, thereby avoiding the conflict, but the court specifically rejected the argument.[9] In the *Boillot* case, similar language in the insurance clause was held ineffective to subject to reduction payments for pre-existing disabilities.[10]

Nor can the *Hobson* case be distinguished as did the court below on the ground that the first page of the policy stated in large type that the monthly benefits were to be $100. In the instant case there is no such statement in large type, but the application states that the weekly indemnity is $50, without any qualifying or limiting language to suggest that there may be a reduction, and the policy as a whole, as we have said, conveys no contrary impression to the layman reading it. The public policy which dictates resolution of ambiguities in favor of the insured rests upon the need to protect against the opportunity which insurance companies have to engage in the sort of obscurantism which conveys one meaning of their contracts to lawyers and another meaning to laymen.[11]

Reversed.

BASTIAN, Circuit Judge, *dissenting:* I think the judgment appealed from should be affirmed on the opinion of the Municipal Court of Appeals (*Buchanan* v. *Massachusetts Protective Association, Inc.*, 102 A. 2d 757, 82 W.L.R. 594).

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[9] 221 P. 2d 761, 764.

[10] 102 S.W. 2d 132, 144.

[11] Hays v. Home Life Ins. Co., *supra*, note 2.

THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 1421

JOSEPH W. BUCHANAN, APPELLANT,

v.

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
a body corporate, APPELLEE.

Appeal from The Municipal Court for the
District of Columbia,
Civil Division.

(Argued January 11, 1954 Decided February 3, 1954)

Jo V. Morgan, Jr., for appellant.

Louis M. Denit, with whom *Richard A. Bishop* was on the brief, for appellee.

Before CAYTON, Chief Judge, and HOOD and QUINN, Associate Judges.

CAYTON, *Chief Judge:* Appellant is the insured under two health and accident policies issued by appellee insurance company. He became totally disabled by disease within the meaning of the policies and the insurance company paid him periodic indemnities until he became 60 years of age. After that time the company, relying on a provision in the policy, reduced the amount of payments by fifty per cent. The insured sued for the difference, and the trial court having ruled against him, he brings this appeal. The sole question for decision is whether the insured was entitled to full benefits, or half thereof, after age 60.

One contract, "The Perfection Policy," provides for weekly indemnities during periods of disability resulting from disease. The other, called "Daily Benefit Policy," provides for daily payments during such periods. The pertinent provisions of the two policies are substantially identical, and we need refer only to the first-named.

The policy (Part N) provides: "The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent." Appellant argues that this provision means that benefits are to be 50% less for disabilities commencing *after* age 60, but that full benefits must be paid for disabilities beginning *before* that age and continuing beyond it.

We think the policy cannot be so construed. It provides no limitation as to disabilities commencing after the insured's sixtieth birthday. It speaks only of indemnities and makes them automatically 50% less at age 60. It seems reasonable to suppose that if it was not intended that there be a reduction at age 60 with respect to already existing disabilities, language indicating that purpose would have been used. We think the quoted language cannot be said to be ambiguous, so as to bring into operation the familiar rule of applying a construction favorable to the insured, and thus adopting his version of the meaning of the words. Considered alone the section is clear and unqualified, and according to it all benefits become 50% less after age 60 without regard to the age of insured at the time he first incurred disability.

Appellant cites *Hobson* v. *Mutual Benefit Health & Accident Ass'n*, 99 Cal. App. 2d 330, 221 P. 2d 761, in support of his construction. The policy there considered was unlike the one before us. It provided without qualification that $100 per month would be paid to insured so long as he lived and suffered disability. In large type on the first page of the policy appeared the words "Monthly Benefits $100.00 Maximum Monthly Benefits $200.00." The court held that "In view of these eye-catching positive statements" a subsequent provision calling for reductions in the monthly payments beginning at age 56 would apply only to disabilities beginning after that age. In the policy before us there are no such positive or unqualified statements.

We next consider whether part N conflicts with other provisions of the policy, so as to create ambiguities which are to be resolved in favor of appellant. Part A provides that the insurer "will pay during the continuance of such disability Fifty Dollars per week, *as hereinafter limited.*" (Emphasis supplied.) Certainly this section does not conflict with part N. On the contrary it is clear that part N was intended as a limitation upon part A, and no reason appears why it should not take effect as such.

A rider attached to the policy provides: "If total disability resulting from disease and arising thereunder prior to the insured's sixtieth birthday continues beyond the sixty weeks described in Clause I of the attached policy, the weekly indemnity *provided by said policy* shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled . . . ." (Emphasis supplied.) Here again there is no conflict with part N. The rider was for the benefit of the insured, by making the "indemnity provided by said policy" payable for life, instead of terminating completely at age 70, as it would have done except for the rider. The "indemnity provided by said policy" is the amount named in part A as limited by part N.

Appellant relies on *Boillot* v. *Income Guaranty Co.*, 231 Mo. App. 531, 102 S. W. 2d 132, and an alternative holding in *Hobson* v. *Mutual Benefit Health & Accident Ass'n*, *supra*, where somewhat similar provisions were found to be ambiguous. But in those cases the policies contained unequivocal agreements to pay fixed monthly sums, and it was held that subsequent clauses, limiting or reducing liability, must fail for repugnancy. In the case before us there is, as we have seen, no repugnancy between the limiting clause and other policy provisions.

We think we would have to read into the policy ambiguities and conflicts which are not there, and distort its plain intent, in order to adopt the meaning for which appellant contends.

Affirmed.

IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

No. M 15037-53

JOSEPH W. BUCHANAN, *Plaintiff*,

v.

THE MASSACHUSETTS PROTECTIVE ASSOCIATION, INC., *Defendant*.

Opinion of the Court

The above-entitled matter came on for hearing on October 2, 1953 before the Court without a jury upon the Complaint, Amendment to Complaint and Supplement to Complaint as Amended, and after introduction of necessary exhibits and admissions the Court took the case under advisement.

The undisputed facts are as follows:

Upon written applications duly filed with the defendant insurance company by the plaintiff, two certain policies of insurance were issued to him, No. 359518 known as "The Perfection Policy" and No. 412685, both on March 4, 1924. Attached to each policy and issued on the same date were two riders which provided as follows:

CONTINUOUS DISABILITY RIDER

> If total disability resulting from disease and arising thereunder prior to the insured's sixtieth birthday continues beyond the sixty weeks described in Clause I (of Policy No. 359518) (beyond the 365 days described in Clause E of Policy No. 412685), the weekly indemnity *provided by said policy* shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled by accident, or similarly disabled and necessarily confined within the house by disease, in either case under the regular care of a licensed physician. *Total disability due to tuberculosis* * * * shall however be construed as confining sickness

hereunder irrespective of whether or not the insured be strictly confined within the house.

In all other respects the terms, provisions, and conditions of said policy remain the same. (Emphasis supplied)

The pertinent provisions of the two policies issued herein are as follows:

POLICY No. 319518

A. TOTAL DISABILITY FROM ACCIDENT OR DISEASE. If such* disease result in continuous total disability requiring the regular and personal attendance of a licensed physician, the Association will pay during the continuance of such disability FIFTY Dollars per week, as hereinafter limited.

I. The weekly indemnity provided for in this policy caused by accidental injuries shall be paid so long as the insured lives and suffers continuous total disability from the date of the accident, otherwise weekly indemnities for disabilities caused by accident or disease shall not collectively cover periods exceeding sixty (60) weeks. * * *

N. The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent.

POLICY No. 412685

A. TOTAL DISABILITY FROM ACCIDENT OR DISEASE. If any* disease results in continuous total disability requiring the regular and personal attendance of a licensed physician, the Association will pay during the continuance of such disability SEVEN Dollars per day, as hereinafter limited.

E. The indemnities provided by this policy, collectively, shall not cover periods of disability exceeding three hundred and sixty-five (365) days in the aggregate.
• • •

I. The term of this policy commences upon the date hereof and runs until the insured's seventieth birthday, unless the policy previously expires under provision E above. After the insured passes his sixtieth birthday all indemnities payable under this policy will automatically be reduced Fifty Per Cent.

The policy holder (plaintiff herein) reached his 60th birthday on November 21, 1952. Prior to that date he had developed tuberculosis and the insurance company under said policies had been paying him indemnities of $50.00 per week and $7.00 per day but after said date the indemnities were reduced to $25.00 and $3.50 respectively. Premiums have been fully paid by the policy holder to date.

The sole question involved in this case is the construction of the effect of the rider upon each policy in-so-far as the *amounts of indemnity payments* are concerned *after* the insured's 60th birthday.

Plaintiff admits that, if there were no rider to either policy, the plaintiff insured after the age of 60 years would have had his benefits reduced fifty per cent, but contends that, as his total disability was due to disease which occurred prior to his 60th birthday, then the rider only eliminates the 60th birthday from each clause and reserves to him the right to receive benefits at the full weekly and daily rate provided in the total disability clauses.

On the other hand, the defendant insurance company contends that if there were no riders the plaintiff would have received indemnities for time not exceeding 60 weeks (or 365 days in the second policy) at the full rate and then the half rate after his 60th birthday; and that the rider eliminates the 60 week or 365 day limitation as well as

the 70th birthday termination of the policies and makes the indemnity payments continuous as long as the insured lives but at the half rate provided for beyond the 60th birthday.

The Court has considered all the evidence in this case, including the exhibits and the admissions of the parties, either in writing or through their counsel, and has reached the conclusion that a fair and reasonable construction of the policies in the light of their respective riders does not entitle the plaintiff to recover in this case.

The Court is aware that the decisions favor a liberal construction of insurance policies for the benefit of the insured and that any ambiguity must be construed strictly against the insurance company. No citation of cases is required in support of this well recognized principle of law.

In the present case, the Court does not find any ambiguity in applying the language of the riders to the clauses of the policies. It is clear that the provisions of the riders take precedence over those contained in the bodies of the policies and both are to be taken into consideration in the fair and reasonable construction of the terms. In all events, policies of insurance like other contracts must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties.

In the present case the insured developed tuberculosis prior to his 60th birthday on November 2, 1952 which resulted in total disability entitling him indemnity benefits at the rate of $50.00 per week under Policy No. 319518 and $7.00 per week under Policy No. 412685. Without the rider, the insured would have taken a fifty per cent cut in indemnity payments on his 60th birthday and received no payments at all after his seventieth birthday. By the issuance of the supplementary contract (rider), he was entitled to receive indemnity payments for the duration of his life but at the rate provided by the policy, namely,

fixed weekly and daily indemnities to the age of 60 years and fifty per cent of these amounts thereafter for life. In other words, the riders clearly affect the time limits of the policies under total disability situations arising prior to the 60th birthday but do not alter or change the computation of the payments which the insured is entitled to receive and which are fixed by other clauses. The policies set the payments at $50.00 per week and $7.00 per day up to the 60th birthday and thereafter curtailed the payments in half to the 70th birthday, while the riders eliminate the 70th birthday and grant indemnities for life in accordance with the regular computation thereof. The Court is therefore satisfied that the rates of indemnities under the policies are not changed but the limitation of time in which said indemnities are payable have been changed.

Accordingly, the Court concludes that the defendant is entitled to a finding in its favor in the present case. An entry to that effect will be made as of the date of this opinion.

FRANK H. MYERS
Frank H. Myers
Trial Judge

October 6, 1953

Copies mailed to:

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SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1955

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC., *Petitioner*

vs.

JAMES W. BUCHANAN

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 2nd, 1955.

(Sgd) FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States

Dated this 23rd day of June, 1955

FILED
AUG 9 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 182

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
Petitioner

v.

JOSEPH W. BUCHANAN, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE OF COURT

Supreme Court of the United States, Rule 19 ..... 2, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 182

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC.,
Petitioner

v.

JOSEPH W. BUCHANAN, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Joseph W. Buchanan, respondent, by his counsel, hereby opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

COUNTERSTATEMENT OF THE MATTERS INVOLVED

Generally, the statement of facts commencing on Page 2 of the petition is correct. However, respondent takes issue with the statement found on Page 2 and repeated on Page 6 of the petition that the policy provisions expressly reduced indemnity 50 per cent

after the insured reach sixty years of age. Just what the policy read as a whole was the entire subject matter of the controversy in the United States Court of Appeals, and that Court, applying the ordinary rules of interpretation, held that the policies did not expressly reduce the indemnities by 50 per cent under the facts of this case, because respondent became permanently and totally disabled prior to reaching age sixty.

Respondent also questions the relevancy of the statement that five judges in various courts below agreed with petitioner, as stated on Page 6 of the petition. The United States Court of Appeals had the duty to consider legal points irrespective of rulings below. The important fact is that the majority of the United States Court of Appeals ruled in favor of the respondent. If we are going to count noses of judges, however, it may be pointed out that in the United States Court of Appeals, which contains nine judges, one panel of three judges unanimously granted the appeal after an oral hearing, another panel of three judges decided the case in favor of the respondent on the merits, and the entire United States Court of Appeals, sitting in banc, denied a petition for rehearing, in which this "nose counting" point was urged.

REASONS FOR DENYING THE WRIT

Introduction

The instant case does not present the relatively unusual type of decision which is normally reviewed by the granting of a petition for a writ of certiorari. See this Honorable Court's Rule 19. Broken down to its basic essential, the instant case is nothing more than the interpretation by a court of competent jurisdiction

of an insurance policy, hundreds, and probably thousands of such opinions being handed down by various courts throughout these United States during the course of a year.

PETITIONER'S POINTS

The three points which the petitioner has urged as supporting the granting of the writ are without special merit.

Point I

On pages 7 and 8 of its petition, petitioner cites five decisions of this Honorable Court; all but one of which are relatively old decisions. Every one of the decisions cited recognizes the basic rule in the interpretation of insurance policies, that any doubt or ambiguity shall be resolved against the insurance company, on which the Court of Appeals relied in the instant case.

In the cited case of *Liverpool, etc. Ins. Co.* v. *Kearney,* 180 U.S. 132, decided by this Court in 1901, this Court said, 180 U.S. at 136:

> "To the general rule there is an apparent exception in the case of contracts of insurance; namely, that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. The exception rests on the ground that the company's attorneys, officers or agents prepared the policy, and it is its language that must be interpreted. *First Nat. Bank* v. *Hartford F. Ins. Co.,* 95 U.S. 673, 678, 679, 24 L. ed. 563, 565; *Moulor* v. *American L. Ins. Co.,* 111 U.S. 335, 341, 28 L. ed. 447, 449, 4 Sup. Ct. 466."

This Honorable Court then proceeded to do just that with respect to the fire insurance policy under con-

sideration, resolving all doubts and ambiguities against the insurance company, and confirmed the judgment which had been entered below in favor of the insured.

Not one of the decisions of this Honorable Court cited on pages 7 and 8 of the petition are in point with respect to the facts. Each one construed a different policy containing very different provisions.

The three Court of Appeals opinions which are cited from the Second, Third and Fourth Circuits as well as the *Continental Casualty Company* case from the District of Columbia Circuit, cited on page 9 of the petition, are likewise very different with respect to the facts.

The opinion below is entirely in accord with, and cites in footnote 2 (Page 4a of Appendix of the petition for certiorari) the case of *Stroehman* v. *Mutual Life Co.,* 300 U. S. 435, a later opinion than any cited by petitioner, and is also in accordance with the general rules for interpretation of insurance policies recognized in the *Stroehman* case, the earlier opinions of this Honorable Court, and those of the Courts of the District of Columbia, *Mutual Life Insurance Co.* v. *Hurni Packing Co.,* 263 U. S. 167, 31 A.L.R. 102; *Yeaton* v. *Fry,* 5 Cranch 335 (U. S. 1809 on appeal from Dist. of Col.); *Phoenix Mut. Ins. Co.* v. *Flynn,* 83 U. S. App. D. C. 381, 171 F. 2d 982; *Hayes* v. *Home Life Ins. Co.,* 83 U. S. App. D. C. 110, 168 F. 2d 152; *Penn. Ind. Fire Corp.* v. *Aldridge,* 73 App. D. C. 161, 117 F. 2d 774; *Maye* v. *New Amsterdam Casualty Co.,* 40 App. D. C. 249 *cert. denied* 238 U. S. 624; *Heilman* v. *American Casualty Co.,* 81 A. 2d 463 (Mun. App. D. C.) *affd.* 90 U. S. App. D. C. 171, 194 F. 2d 348.

It is submitted that the decision below is entirely in accord with applicable decisions of this Court and

is not in conflict with the decisions of other Circuits or of the District of Columbia

Point II

It is submitted that the Court below has construed the terms of the insurance contracts at issue in a correct manner. The argument set forth in Point II of petitioner's brief, that the Court of Appeals has made a new contract, assumes that the Court of Appeals decision is wrong. It is submitted, that for the reasons given in the opinion below, it is correct.

Moreover, the applications for these policies were executed in South Carolina, and the policies were delivered to the insured there, having been mailed to him by the Company (R. 25, 31, 34-37). The law of South Carolina is even more favorable to insured, if anything, than that of the District of Columbia, the highest court of that jurisdiction holding that a clause will be construed in favor of the insured and against the company "when there existed the least doubt as to the meaning of the language employed." *Beckett* v. *Jefferson Standard Life Insurance Company,* 165 S. C. 581, 164 S.E. 130, quoting with approval from *Bolt* v. *Life Insurance Company,* 156 S. C. 117, 152 S.E. 776. See also *Harvey* v. *Union Central Life Insurance Company,* 45 F. 2d 78 *cert. denied* 283 U. S. 829 (on appeal from the Eastern District of South Carolina).

The application was accepted in Massachusetts, and the policies were executed and dated there (R. 21, 24, 27, 30, 35, 37). If they be held to be Massachusetts contracts, the law of that state also is probably at least as favorable in this respect as in the District of Columbia. The Supreme Judicial Court of Massa-

chusetts has said, "Where the language is of doubtful meaning every doubt is to be resolved against the insurer and in favor of the insured." *Bouvier* v. *Craftsman Ins. Co.*, 300 Mass. 5 at 7, 13 N.E. 2d 619.

The argument set forth in Point II also assumes that either a South Carolina Court or a Massachusetts Court would have decided this case differently than the Court below. It is submitted, under the authorities just cited, that the opinion would be in favor of the respondent in both those jurisdictions.

Finally, it might be suggested that were this Honorable Court to review the opinions of the various Courts of Appeal every time one of the parties felt that a contract between private parties had not been properly construed, the docket of this Honorable Court would be hopelessly overburdened, and the decision of important national issues seriously delayed.

Point III

Point III of petitioner, set forth on pages 10 and 11 of the petition, likewise bases its argument on the fallacious premise that the Court of Appeals flagrantly disregarded the policy provisions. A reading of the opinion will indicate that the Court carefully considered these provisions and construed them in accordance with existing principles of insurance law.

THE OPINION BELOW IS IN ACCORD WITH EXISTING LAW

Finally, it should be pointed out that not one case from any jurisdiction has been cited by petitioner holding, on similar facts, contrary to the decision of the United States Court of Appeals below. On the other hand, as it set forth in the opinion below, two

cases on similar facts, the cases of *Hobson* v. *Mutual Benefit Health & Accident Ass'n,* 99 Cal. App. 2d 330, 221 P. 2d 761, and *Boillot* v. *Income Guaranty Co.,* 231 Mo. App. 531, 102 S.W. 2d 132, are in accord with the decision below. The decision, then, can scarcely be characterized as a flagrant departure from existing law, as petitioner blandly assumes throughout its petition. Rather it is in accord with the only decisions found by either party, or by the Court of Appeals.

CONCLUSION

The instant case is not of the kind giving rise to those "special and important reasons" required by this Honorable Court's Rule 19 before a petition for a writ of certiorari will be granted. The petition should be denied.

Respectfully submitted,

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